

GOVERNMENT PROPOSED JURY INST. NO. 155

Offense Charged

The indictment sets forth ___ counts or charges.

Count I charges that on or about the _____ day of _____, 19____, in the _____ District of _____, the defendant, _____, a resident of _____, did willfully make and subscribe [***Describe Document***] , which was verified by a written declaration that it was made under the penalties of perjury and was filed with the Director, Internal Revenue Service Center, at [***City***], [***State***], which said [***Describe Document***] he [she] did not believe to be true and correct as to every material matter in that the said [***Describe Document and False Fact(s)***], whereas, he [she] then and there well knew and believed, [***Describe Correct Fact(s)***].

Count II charges that * * *.

All in violation of Title 26, United States Code, Section 7206(1).

26 U.S.C. § 7206(1)

Devitt, Blackmar and O'Malley, ***Federal Jury Practice and Instructions*** (4th Ed. 1990), Section 56.13

GOVERNMENT PROPOSED JURY INST. NO. 156

False Return -- Statute Involved

Section 7206(1) of the Internal Revenue Code provides, in part, as follows:

Any person who -- * * * [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter * * * shall be guilty [*of an offense against the laws of the United States*].

26 U.S.C. § 7206(1)

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.14

GOVERNMENT PROPOSED JURY INST. NO. 157Elements of Section 7206(1)
(False Income Tax Return)

The gist of the offenses charged in Counts ___ and ___ of the indictment is the willful making and subscribing by the defendant of his [her] [joint] individual income tax return[s] for the years _ _ and ___, which contains [**contain**] a written declaration that it [**they**] was [**were**] made under the penalties of perjury, and which the defendant did not believe to be true and correct as to every material matter. Each year, that is ___ and ___, is to be considered separately by you.

To prove a violation, the government must establish each of the following four (4) elements beyond a reasonable doubt;

1. The defendant made, or caused to be made, and signed (subscribed) an income tax return for the year in question that was false as to a material matter.
2. The return contained a written declaration that it was made under the penalties of perjury.
3. The defendant did not believe the return to be true and correct as to the material matter(s) charged in the indictment; **1** and
4. The defendant made, or caused to be made, and signed (subscribed) the return willfully.

26 U.S.C. § 7206(1)

United States v. Bishop, 412 U.S. 346, 350, 359 (1973)

United States v. Pomponio, 429 U.S. 10 (1976)

United States v. Monteiro, 871 F.2d 204, 208 (1st Cir. 1989)

United States v. Drape, 668 F.2d 22, 25 (1st Cir. 1982)

Hoover v. United States, 358 F.2d 87, 88 (5th Cir. 1966), *cert. denied*, 385 U.S. 822 (1966)

United States v. Sassak, 881 F.2d 276, 278 (6th Cir. 1989)

United States v. Duncan, 850 F.2d 1104 (6th Cir. 1988)

United States v. Gurtunca, 836 F.2d 283, 287 (7th Cir. 1987)

United States v. Whyte, 699 F.2d 375, 381 (7th Cir. 1983)

United States v. Oggoian, 678 F.2d 671, 673 (7th Cir. 1982), *cert. denied*, 459 U.S. 1018 (1982)

United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980)

United States v. Holland, 880 F.2d 1091, 1096 (9th Cir. 1989)

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984)

United States v. Brooksby, 668 F.2d 1102 (9th Cir. 1982)

NOTE

1 It has been held that an instruction can specify the material matters charged in the indictment. Thus, in *United States v. Oggoian*, 678 F.2d 671, 673 (7th Cir.), *cert. denied*, 459 U.S. 1018 (1982), the court upheld the following instruction given by the trial court:

The second element that has to be proved is that the tax return was false as to a material matter. That is, it contained an understatement of adjusted gross income.

GOVERNMENT PROPOSED JURY INST. NO. 159

False Return -- Essential Elements
(False Income Tax Return)

Now, to prove the charge that is contained in each of these (three) counts of the indictment, the government must establish each of four propositions beyond a reasonable doubt.

The first one is that the defendant made, or caused to be made, and that the defendant signed the federal tax return for the year in question, an income tax return.

The second element that has to be proved is that the tax return was false as to a material matter. That is, it contained an understatement of adjusted gross income.

Third, that when the defendant made, or caused to be made, and when the defendant signed the return he did so willfully and knowingly.

Fourth, that the return contained a written declaration that it was made under the penalty of perjury.

It is not enough for the government to prove simply that the tax return is erroneous. If you find from your consideration of all the evidence, that each of the four numbered propositions has been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant guilty of that count.

If, on the other hand, you find from your consideration of all the evidence that any of those propositions has not been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant not guilty as to that count.

The above instruction is quoted with approval in *United States v. Oggoian*, 678 F.2d 671, 673 (7th Cir.), *cert. denied*, 459 U.S. 1018 (1982), with the court "finding that the charge as a whole covered the essential elements of the offense (Sec. 7206(1)), including knowledge of the appellant that the returns were false as to material matters." *Oggoian*, 678 F.2d at 674.

See also Sansone v. United States, 380 U.S. 343, 352 (1965)

GOVERNMENT PROPOSED JURY INST. NO. 160

False Return - Essential Elements
(False Income Tax Return)

The defendant is charged in [*Count* ____ *of*] the indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant filed a tax return knowing that it contained false information; and

Second, that the defendant acted for the purpose of evading the defendant's duty under the tax laws and not as a result of accident or negligence.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 9.06D (1989)(modified)

GOVERNMENT PROPOSED JURY INST. NO. 161

False Return - Essential Elements
(False Income Tax Return)

Title 26, United States Code, Section 7206(1), makes it a federal crime or offense for anyone to willfully file a Federal income tax return knowing it to be false in some material way.

The Defendant can be found guilty of that offense only if all the following facts are proved beyond a reasonable doubt:

First: That the Defendant filed an income tax return which was false in a material way as charged in the indictment; and

Second: That the Defendant did so knowingly and willfully, as charged.

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 75 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 162

False Return -- Essential Elements
(False Income Tax Return)

To convict a defendant, the government must prove each of the following three elements beyond a reasonable doubt:

1. the willful making and subscribing of a return filed with the Internal Revenue Service that was incorrect as to a material matter;
 2. that the return contained a written declaration that it was made under the penalty of perjury;
- and
3. that the defendant did not believe the return to be true and correct as to the material matter charged in the indictment.

The jury is further instructed that each of the tax counts alleges that the particular defendant received substantial other income in addition to the total income reported on the return. It is not necessary for the government to prove the exact amount of the additional income. It is sufficient if the government proves beyond a reasonable doubt that the defendant had income substantially in excess of the total income he reported on his return.

The false statement alleged in each of the tax counts is that the total income reported on the return involved did not contain substantial other income purportedly received by the particular defendant. The court instructs you that a statement of total income on a tax return is material as a matter of law.

Manual of Model Criminal Jury Instructions for the Ninth Circuit, Instruction No. 9.07D (1989)

The above instruction is quoted in ***United States v. Hedman***, 630 F.2d 1184, 1196 n.6 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981), with the court commenting: "We therefore conclude that the trial court properly instructed the jury with respect to the tax counts (Sec. 7206(1)) alleged in the indictment." ***Hedman***, 450 U.S. at 1196.

July 1994

26 U.S.C. § 7206(1)

COMMENT

1 The opinion in *Hedman* is confusing. In the body of the opinion, the court states that false statements relating to gross income, irrespective of the amount, constitute a material misstatement. But the jury instruction approved by the court requires the government to prove that the understatement was substantial. *Hedman*, 630 F.2d at 1196 & n.6.

GOVERNMENT PROPOSED JURY INST. NO. 164

Documents Within Section 7206(1)
(Income Tax Returns)

I instruct you that the United States Individual Income Tax Returns, Forms 1040, involved in this case are returns or other documents as contemplated by Section 7206(1) of the Internal Revenue Code of 1986. ¹

26 U.S.C. § 7206(1)

NOTE

¹ This instruction should not be given in a case where there is a factual issue as to whether the document in question is an income tax return.

GOVERNMENT PROPOSED JURY INST. NO. 165

Subscribed -- Defined
Proof of Signing of Return

The word "subscribe" simply means the signing of one's name to a document.

"The fact that an individual's name is signed to a return * * * shall be prima facie evidence for all purposes that the return * * * was actually signed by him," which is to say that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it.

26 U.S.C. § 6064

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions* (4th. Ed. 1990), Section 56.22

Cashio v. United States, 420 F.2d 1132, 1135 (5th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970)

United States v. Wainwright, 413 F.2d 796, 802 n.3 (10th Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970)

United States v. Carrodegua, 747 F.2d 1390, 1396 (11th Cir. 1982), *cert. denied*, 474 U.S. 816 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 166Subscribed-Defined

The fact that an individual's name is signed to a return means that, unless and until outweighed by evidence in the case which leads you to a different or contrary conclusion, you may find that a filed tax return was in fact signed by the person whose name appears to be signed to it. If you find proof beyond a reasonable doubt that the defendant had signed his [her] tax return, that is evidence from which you may, but are not required to, find or infer that the defendant had knowledge of the contents of the return.

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit,
Instruction No. 6.26.7201 and 6.26.7206 (1989)

July 1994

26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO. 167

Material Matter

If you find that the government has proved these things [*elements of (i.e., 26 U.S.C. § 7206(1))*], you need not consider whether the false statement was a material false statement, even though that language is used in the indictment. This is not a question for the jury to decide.

Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Instruction No. 2.90 (1990)

Materiality of the alleged false statement is a question for the court. *United States v. Taylor*, 574 F.2d 232 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978).

GOVERNMENT PROPOSED JURY INST. NO. 168Material Matter

The question of the materiality of the allegedly false statements made in connection with the subscribing or signing of a tax return is a question of law for the court.

The court instructs you that if you find that the defendant [*set forth false item charged in indictment, e.g., understated the gross income reported on his [her] return*], then I instruct you that [*e.g., the understatement of gross income*] is a material matter as contemplated by Section 7206(1).

As the Sixth Circuit has written,

"We note that the materiality of a perjured statement on a tax return is a question of law, and is for the judge, not the jury, to decide. Though this rule has not been announced before today in this Circuit, it is the prevailing rule elsewhere. *United States v. Rogers*, 853 F.2d 249, 251 (4th Cir.), *cert. denied*, 488 U.S. 946 (1988); *United States v. Flake*, 746 F.2d 535, 537-38 (9th Cir. 1984), *cert. denied*, 469 U.S. 1225, (1985); *United States v. Greenberg*, 735 F.2d 29, 31 (2d Cir. 1984); *United States v. Whyte*, 699 F.2d 375, 379 (7th Cir. 1983); *United States v. Gaines*, 690 F.2d 849, 858 (11th Cir. 1982); *United States v. Strand*, 617 F.2d 571, 574 (10th Cir.), *cert. denied*, 449 U.S. 841, (1978); *United States v. Romanow*, 509 F.2d 26, 28-29 (1st Cir.1975). A ruling apparently to the contrary, *United States v. Null*, 415 F.2d 1178, 1181 (4th Cir. 1969), has since been rejected by the Fourth Circuit. *Rogers*, 853 F.2d at 251. And the rule is not only widespread: we believe it is also sound."

United States v. Fawaz, 881 F.2d 259, 261-262 (6th Cir. 1989).

See *Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit*, Instruction No. 6.26.7206 (1989)

July 1994

26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO. 169

Material Matter

The *materiality* of the alleged false statements is not a matter for you to determine, but is a question for the Court to decide. You are instructed that the false statements charged in the indictment, if they were made, were *material* statements.

Pattern Jury Instruction of the District Judges Association of the Eleventh Circuit, Instruction No. 71 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 170

Omission of Material Matter

An income tax return may be materially false not only because of a misstatement of a material matter, but also because of an omission of a material matter.

Siravo v. United States, 377 F.2d 469, 472 (1st Cir. 1967)

United States v. Taylor, 574 F.2d 232, 235-236 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978)

United States v. Cohen, 544 F.2d 781, 783 (5th Cir.), *cert. denied*, 431 U.S. 914 (1977)

GOVERNMENT PROPOSED JURY INST. NO. 171

Material Matter -- Gross Income

If you find that the defendant made a false statement on his tax return relating to gross income, irrespective of the amount, that is to say, if you find that the defendant received additional income in addition to that reported on his [her] return, regardless of the amount, then you are instructed that such omission of income is a material matter, as required under Section 7206(1).

United States v. Wilson, 887 F.2d 69, 75 (5th Cir. 1989)

United States v. Hedman, 630 F.2d 1184, 1196 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981)

United States v. Young, 804 F.2d 116, 119 (8th Cir. 1986), *cert. denied*, 482 U.S. 913 (1987)

United States v. Kaatz, 705 F.2d 1237, 1246 (10th Cir. 1983)

United States v. Gaines, 690 F.2d 849, 857-858 (11th Cir. 1982)

See also, United States v. Marashi, 913 F.2d 724, 736 (9th Cir. 1990)

GOVERNMENT PROPOSED JURY INST. NO. 172

Material Matter -- Deductions

I instruct you that personal deductions are material matters as required under Section 7206(1). The evidence need not establish beyond a reasonable doubt that the deductions totalled the exact amount alleged in the indictment, or that the deductions were overstated in the exact amount alleged, but only that the defendant willfully overstated or caused to be overstated in some substantial amount the deductions as charged in the indictment.

United States v. Damon, 676 F.2d 1060, 1064 (5th Cir. 1982) -- business loss deductions, Sec. 7206(2), but applicable to Sec. 7206(1)

United States v. Warden, 545 F.2d 32, 37 (7th Cir. 1976)

GOVERNMENT PROPOSED JURY INST. NO. 173

Proof Of One False Material Item Enough

The indictment charges in Count _____ that the defendant's income tax return for the year _____ was false in (e.g., three) material respects, i.e., [*state false material matters, e.g., understatement of potential fees, understatement of interest income, and understatement of capital gains*].

You are instructed that these items are material items and that it is sufficient if you find that the government has established beyond a reasonable doubt that any one of these items was falsely reported on the defendant's return. In other words, the government does not have to prove that all of the items are false: proof of the falsity of a single item is sufficient. On the other hand, if you find that none of these items was falsely reported on the defendant's return, then you should acquit the defendant.

Silverstein v. United States, 377 F.2d 269, 270 n.3 (1st Cir. 1967)

United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969)

United States v. Rayor, 204 F. Supp. 486, 491 (S.D. Cal. 1962)

GOVERNMENT PROPOSED JURY INST. NO. 174Proof of Tax Deficiency Not Required

You are instructed that in proving that the defendant violated Section 7206(1), the government does not have to prove that there was a tax due and owing for the year(s) in issue. Whether the government has or has not suffered a pecuniary or monetary loss as a result of the alleged return is not an element of Section 7206(1).

Devitt, Blackmar and O'Malley, *Federal Jury Practice and Instructions*, (4th Ed. 1990), Section 56.19

Silverstein v. United States, 377 F.2d 269, 270 (1st Cir. 1967)

United States v. Olgin, 745 F.2d 263, 272 (3d Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985)

United States v. Johnson, 558 F.2d 744, 747 (5th Cir. 1977)

United States v. Ballard, 535 F.2d 400, 404 (8th Cir.) *cert. denied*, 429 U.S. 918 (1976)

United States v. Marashi, 913 F.2d 724 (9th Cir. 1990)

United States v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984)

United States v. Carter, 721 F.2d 1514, 1539 (11th Cir.), *cert. denied*, 469 U.S. 819 (1984)

See Sansone v. United States, 380 U.S. 343, 352 (1965) -- re Sec. 7207 but materiality language of Secs. 7207 and 7206(1) is identical.

July 1994

26 U.S.C. § 7206(1)

GOVERNMENT PROPOSED JURY INST. NO. 175

Proof of Tax Deficiency Not Required

It is not necessary that the Government be deprived of any tax by reasons of the filing of the return, or that it even be shown that additional tax is due to the Government, only that the Defendant wilfully filed a false return.

A declaration is false if it was untrue when made and was then known to be untrue by the person making it. A declaration contained within a document is false if it was untrue when the document was used and was then known to be untrue by the person using it.

Pattern Jury Instructions of the District Judges Association of the Eleventh Circuit, Instruction No. 71 (1985)

GOVERNMENT PROPOSED JURY INST. NO. 176Willfulness -- Section 7206(1)

To find the defendant guilty of violating Section 7206(1), you must not only find that he [she] did the acts of which he [she] stands charged, but you must also find that the acts were done willfully by the defendant.

The word "willfully," as used in this statute, means a voluntary, intentional violation of a known legal duty. In other words, the defendant must have acted voluntarily and intentionally and with the specific intent to do something he [she] knew the law prohibited, that is to say, with intent either to disobey or to disregard the law.

In determining the issue of willfulness, you are entitled to consider anything done or omitted to be done by the defendant and all facts and circumstances in evidence that may aid in the determination of his [her] state of mind. It is obviously impossible to ascertain or prove directly the operations of the defendant's mind; but a careful and intelligent consideration of the facts and circumstances shown by the evidence in any case may enable one to infer what another's intentions were in doing or not doing things. With the knowledge of definite acts, we may draw definite logical conclusions.

We are, in our daily affairs, continuously called upon to decide from the acts of others what their intentions or purposes are, and experience has taught us that frequently actions speak more clearly than spoken or written words. To this extent, you must rely in part on circumstantial evidence in determining the guilt or innocence of the defendant.

In this regard, there are certain matters that you may consider as pointing to willfulness, if you find such matters to exist in this case. By way of illustration only, willfulness may be inferred from conduct such as *[set forth examples appropriate under the evidence, e.g., making false entries or alteration, or false invoices or documents, concealment of assets or*

covering up sources of income, handling one's affairs to avoid making the records usual in transactions of the kind] and any conduct the likely effect of which would be to mislead or to conceal.

I give you these instances simply to illustrate the type of conduct you may consider in determining the issue of willfulness. I do not by this instruction mean to imply that the defendant did engage in any such conduct. It is for you as the trier of the facts to make this determination as to whether the defendant did or did not.

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1992), Section 17.07 (modified and supplemented)

Devitt and Blackmar, *Federal Jury Practice and Instructions* (4th Ed. 1990), Section 56.20 (modified)

Pattern Jury Instructions, Fifth Circuit (1990 Ed.), Section 2.88 (Note)

Federal Criminal Jury Instructions of the Seventh Circuit (1980 Ed.), Section 6.03 (modified)

Manual of Model Criminal Jury Instructions for the District Courts of the Eighth Circuit (1992 Ed.), Section 7.02 (Comment)

Manual of Model Jury Instructions for the Ninth Circuit (1992 Ed.), Section 5.05 (Comment)

Pattern Jury Instructions, Criminal Cases, Eleventh Circuit (1985 Ed.), Basic Instructions, Instruction No. 9.1, p. 22 (modified)

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Pomponio, 429 U.S. 10, 12 (1976)

United States v. Bishop, 412 U.S. 346, 360 (1973)

Spies v. United States, 317 U.S. 492, 499 (1943)

United States v. Ashfield, 735 F.2d 101, 105 (3d Cir.), *cert. denied sub nom.*, *Storm v. United States*, 469 U.S. 858 (1984)

United States v. Conforte, 624 F.2d 869, 875 (9th Cir. 1980), *cert. denied*, 449 U.S. 1012 (1980)

United States v. Ramsdell, 450 F.2d 130, 133-134 (10th Cir. 1971)

United States v. Spinelli, 443 F.2d 2, 3 (9th Cir. 1971)

COMMENTS

1 It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive." *United States v. Pomponio*, 429 U.S. 10, 12 (1976). *See also* Section 8.06[1], *supra*.

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 *See also* instructions on willfulness set forth as a part of the instructions on 26 U.S.C. § 7201, *supra*.

GOVERNMENT PROPOSED JURY INST. NO. 179Willfully -- Good Faith Defense

The word "willfully," as that term has been used from time to time in these instructions, means a voluntary, intentional violation of a known legal duty. Mere negligence, even gross negligence, accident, or inadvertence is not sufficient to establish willfulness.

[If a person in good faith believes that an income tax return, as prepared by him, truthfully reports the taxable income and allowable deductions of the taxpayer under the internal revenue laws, he cannot be guilty of "willfully" making or subscribing a false or fraudulent return.] ¹

Cheek v. United States, 498 U.S. 192, 201 (1991)

United States v. Garcia, 762 F.2d 1222, 1224 (5th Cir. 1985)

NOTE

¹ The second paragraph of this instruction is not appropriate unless there is evidence of a good faith belief defense. In light of the decision in *Cheek v. United States*, 498 U.S. 192 (1991), care should be taken to ensure that an instruction on the good faith defense does not suggest that a claimed good faith belief as to the requirements of the law or a claimed good faith mistake of law must be objectively reasonable to negate willfulness. However, instructions informing the jury that it may consider the reasonableness of a claimed belief in determining whether a defendant actually held the belief have been held to be consistent with *Cheek*. See, e.g., *United States v. Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993).

COMMENTS

¹ It is not necessary to define the term "willfully" in a tax case in terms of "bad purpose" or "evil motive" in a tax case. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

2 Willfulness has the same meaning in the felony and misdemeanor sections of the Internal Revenue Code. *United States v. Pomponio*, 429 U.S. 10, 12 (1976).

3 See also instructions on good faith belief defense set forth as a part of the instructions on 26 U.S.C. § 7203, *supra*.